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JUL 15 1969
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IN THE

Supreme Court of the United States

October Term, 1969

No. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

vs.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS O'MARA, McCORMICK, PACKARD AND DALY IN OPPOSITION

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Opinions Below

The opinion of the Court of Appeals (Appendix C of Petition) is reported at 407 F(2d) 674. The decision and order of the District Court (Appendix D of Petition) is not reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the named respondents herein may maintain their claim against the union based upon the union's discrimination and unfair representation and, in the same litigation, make claims against the railroad for acting in concert with the union, all of which resulted in discharge of the respondents herein from their employment?

Statutes Involved

The statutory provisions involved are set forth in pages 3 and 4 of the Petition.

Statement

This litigation concerns the discharge of four former employees of the Erie Lackawanna Railroad Company. Prior to the merger of the Delaware, Lackawanna and Western Railroad with the Erie Railroad, these men were employed as stationary engineers for the Delaware, Lackawanna and Western Railroad.

After the merger occurred, the men were furloughed and their positions as stationary engineers were filled by four men formerly holding a laborer's classification for the Erie Railroad.

These replacements, while belonging to the same parent union as the furloughed men, were members of different locals and System Federations, which locals and System Federation became the dominent force upon the merger.

Although the railroad and the union classified these men as furloughed they were never called back to work, and as indicated, their jobs were replaced.

One of the furloughed employees, as a spokesman for their group, contacted the railroad master mechanic and was advised that reason they lost their positions was due to plant obsolescence and not due to the merger and, therefore, no severance compensation was to be forthcoming.

The chief mechanical officer of the railroad was then contacted and he gave the same ruling. Thereupon, two union representatives, the General Chairman of the System Federation and the President of the International, were contacted and they referred the men to the railroad for any further requests for action indicating that there was nothing that they, the union, could or would do.

A complaint was filed in the District Court for the Western District of New York alleging a wrongful discharge by the railroad and hostile discrimination by the union and its officers in arbitrarily and capriciously failing to process their claims.

The District Court dismissed the complaint and an appeal was taken to the Second Circuit Court of Appeals.

The Court of Appeals reversed this holding as to the union defendants indicating that the complaint stated a federal claim for breach of the union's duty of fair representation. The Court further indicated that the plaintiffs should be granted leave to amend their complaint against the railroad, if they could show a joint and combined discrimination by the railroad and union.

I

The decision below is clearly correct.

The Petition indicates that the Court of Appeals ignored *Vaca vs. Sipes,* 386 U. S. 171 arriving at this conclusion by

indicating that case was not cited, referred to or discussed in its opinion.

The fact of the matter is that counsel for the four appellants not only cited *Vaca* in his brief to the Court of Appeals but referred to it in oral argument.

At page 177 the Court stated:

> "It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union has a statutory duty fairly to represent all of these employees, both in collective bargaining with Swift, see Ford Motor Co. vs. Huffman, 345 U. S. 330; Syres vs. Oil Workers International Union, 350 U. S. 892, and in the enforcement of the resulting collective bargaining agreement, see Humphrey vs. Moore, 375 U. S. 335."
>
> "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Humphrey vs. Moore, 375 U. S. at 342. It is obvious that Owens' complaint alleged a breach by the union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action, *e.g.*, Ford Motor Co. vs. Huffman, *supra.*"

It is the essence of the respondents' contentions that the union failed to process their grievances and more seriously, discriminated against these men by agreeing with the railroad as to the abolishing of their jobs and replacement by four men from their union.

The petitioner's major complaint seems to be not that the Court of Appeals reversed as to them but that they did not reverse as to the railroad.

It is the intention of the respondents herein to file an amended complaint against the railroad as allowed by the Court of Appeals.

The respondents assert that a factual basis does indeed exist for litigation in federal court against both the railroad and the union and that relying upon the liberal pleading requirements as enunciated in *Conley vs. Gibson,* 335 U. S. 41, that they should at long last be allowed to have their day in court.

II

There is no conflict of decisions.

The Petition asserts that the Court of Appeals was in conflict with the Seventh Circuit in *Slagley vs. Illinois Central Railroad Company,* 397 F(2d) 546.

It is submitted that with respect to the claim against the union for hostile discrimination and failure of fair representation, that the National Railroad Adjustment Board has no jurisdiction to entertain such a complaint by an employee. Therefore, any argument relative to exhaustion of remedies in this area is clearly not applicable.

Likewise, in *Slagley,* the aggrieved party was concerned with seniority rights. There is no such relief requested in the instant case as it is clearly recognized that a question as to seniority rights is a matter within the exclusive jurisdiction of the National Railroad Adjustment Board. It is submitted that the Court of Appeals decision in this case is in direct conformity with Glover vs. St. Louis-San Francisco Railway Co., 393 U. S. 324 where the Court states that it is proper for federal courts to exercise jurisdiction over both the union and the railroad.

III

There is no important question of federal law.

The sum and substance of the Court of Appeals decision is to allow the plaintiffs to amend their complaint against the railroad, which they intend to do, and which will allow the litigation to proceed to a point where issue is joined.

The defendants have ample opportunity by means of discovery to inquire into the specifics of the claims and if, after this point, the claims do not meet the standards as required by federal law, the courts will take appropriate action.

It is respectfully submitted that the Court of Appeals, in a relatively narrow ruling on the facts peculiar to this case, merely decided that the plaintiffs below should be allowed to proceed with their lawsuit.

Because of the restricted fact situation, the Court of Appeals ruling will affect few, if any other cases.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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